In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 166

JOSEPH A. FABIANICH AND MARY E. FABIANICH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 17-18) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered May 10, 1962. The petition for a writ of certiorari was filed June 8, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a retired judge of the Court of Customs and Patent Appeals, whose authority to sit was not challenged until appeal, could validly preside at petitioners' trial.

2. Whether petitioners had a fair trial.

STATEMENT

Petitioners were convicted on various counts charging violations of the Mann Act (18 U.S.C. 2421) and of 22 D. C. Code 2707 prohibiting the receipt of money for arranging prostitution. Petitioner Joseph Fabianich, who was convicted on counts 1, 3, 4, 7 and 8, was given consecutive sentences of imprisonment for from one to three years on the first three of such counts (a total sentence of three to nine years), with the sentences on counts 7 and 8 running concurrently with that on count 1. Petitioner Mary Fabianich, who was convicted on counts 2, 4, 5, 6 and 9, received a similar total sentence of three to nine years, the sentences on the first three of such counts running consecutively, and the others concurrent with that on count 2. On appeal the convictions were affirmed.

The government's evidence on the counts on the basis of which the court of appeals affirmed the convictions consisted principally of the testimony of the prostitute involved, Mary Sharp. She testified that one or the other petitioner arranged "dates" for her and that she gave part of the money she received to one of the petitioners. The man involved in each case also testified

as to how he met Mrs. Sharp, his relations with her and the fact of payment.[1]

Petitioners contended in the court below and now contend in the petition for a writ of certiorari that rulings by Judge Jackson deprived them of a fair trial. As to this the court of appeals said (Pet. 18):

> We have examined the record, however, and find that the conduct of the trial fell within permissible limits.

ARGUMENT

1. Petitioners' attack upon the authority of Judge Jackson, a retired judge of the Court of Customs and Patent Appeals, to preside at the criminal trial in the District of Columbia (Pet. 15), is disposed of by this Court's decision in *Lurk* v. *United States*, No. 481, October Term, 1961, decided June 25, 1962.

2. As to petitioners' contention that the conduct of the presiding judge deprived them of a fair trial, we think that the record as a whole supports the conclusion of the court of appeals that petitioners were justly convicted after a fair trial. To reach that conclusion it is not necessary to agree with every ruling made by the trial judge. However, the record as a whole shows that petitioners have misinterpreted some remarks, exaggerated the importance of others and neglected to consider the extent to which defense counsel invited adverse rulings, especially by his attempt to

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[1] See as to Count 2 (J.A. 17-18; 27, 73-74); Counts 3 and 4 (J.A. 19-20, 27-28, 70, 75-76A); Counts 5 and 6 (J.A. 20, 70-71, 76A); Counts 7 and 8 (J.A. 21, 71, 77-80).

try the government's chief witnesses rather than the issues in the case.

a. A number of the rulings of which petitioners complain were in limitation of attempts to show the immorality of the government witness, Mary Sharp, who had already admitted to being a prostitute (see J.A. 25, 35, 37-38, 41, 51-52). The court did allow questions as to whether the witness used narcotics (J.A. 50) and later permitted her to answer questions as to her employment by another as a prostitute (J.A. 63). It also allowed the defense to put on testimony that the witness had arranged dates for another woman in 1954 and 1955, several years before the times charged in the indictment (J.A. 101-103). The court permitted full cross-examination of the witness as to the matters relating to her direct examination. Such limitations as there were on the cross-examination of the witness fall within the rule that the trial court has discretion to control the pursuit of collateral issues. *Wright* v. *United States*, 183 F. 2d 821, 822 (C.A. D.C.); *Blumenfield* v. *United States*, 284 F. 2d 46, 55-56 (C.A. 8), certiorari denied, 365 U.S. 812. Questions as to the present residence of the witness were properly not allowed in view of the government representation, supported by the testimony of an FBI agent out of the presence of the jury, that the witness had been threatened (J.A. 33-34). *United States* v. *Rich*, 262 F. 2d 415, 418-419 (C.A. 2).

Petitioners claim that they should have been allowed to inquire as to the activities of the witness in a house of prostitution during the months of January through May of 1960 (J.A. 36, 37) because count 10 of the in-

dictment charged a "date" by the witness on January 15, 1960, arranged by petitioner Mary Fabianich (Pet. 7). However, that count was dismissed at the close of the government's case on the ground that the witness had testified that she made that date on her own (J.A. 86-87). Petitioners also argue (Pet. 8) both that it was error to admit in evidence the statement of Mary Sharp to FBI agents, on the basis of which she had been cross-examined by the defense, and that it was error to withdraw it before it was seen by the jury (J.A. 124-125). Since petitioners' counsel objected to having the statement in evidence when it was first offered and reasserted later that he did not want the statement in evidence (J.A. 125), and since the statement is not in itself evidence,[2] petitioners are in no position to complain of the ultimate correct ruling. The fact that petitioners' counsel objected to the admissibility of the statement before the jury could not have had the prejudicial effect which petitioners claim (Pet. 8). The jury never saw the statement and heard only those parts which petitioners' counsel read to the witness (*e.g.*, J.A. 53-55).

The alleged interference with the cross-examination of the men who testified (Pet. 8) relates to only a few rulings, which, when examined, prove to be reasonable rulings of the trial judge in an attempt to clarify (J.A. 74, 90) or to keep the trial within reasonable limits (J.A. 81, 129, 131).

Similarly, the claim that the direct examination of

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[2] *See Affronti* v. *United States*, 145 F. 2d 3, 7 (C.A. 8); *United States* v. *Switzer*, 252 F. 2d 139 (C.A. 2), certiorari denied, 357 U.S. 922.

petitioner Joseph Fabianich was unduly curtailed (Pet. 11) is without merit. The limitations on direct examination were reasonable attempts to keep the testimony within the issues (J.A. 109, 115) or to clarify the issues (J.A. 110-111). The court allowed the direct examination to cover matters considerably afield from the charges of the indictment (*e.g.*, J.A. 109, 113).

b. The judge was occasionally critical of defense counsel, usually with considerable justification (J.A. 9, 45, 48, 49, 55, 57, 59, 123, 127), but there was only one exchange before the jury that could be fairly characterized as an altercation (R. 133).[3]

Nor do the procedures followed by the court in hearing and determining counsels' objections to evidence afford a basis for petitioners' claim of bias. Early in the trial, the judge stated that he would not hear argument after he had ruled, but would request argument after objection was made if he wished to hear it (J.A. 14; see J.A. 34). A number of times, the court admonished petitioners' counsel for disregarding this procedure (J.A. 105, 111, 130, 131) but did occasionally allow argument after a ruling (J.A. 67, 69) and permitted argument before ruling when it had doubts with respect to the issue raised (J.A. 103, 115).

Petitioners' exaggeration of incidents is illustrated by the statement that the prosecutor made a personal attack on counsel (Pet. 9). The record shows that the prosecutor meant the defendant (who was the witness at the time) when he said counsel and so explained as

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[3] There were two other arguments outside the presence of the jury (J.A. 49-50, 110-111).

soon as he realized the slip (J.A. 96-97). Similarly, argument of government counsel, based upon the record, that petitioners had not supported by evidence impeaching questions asked on cross-examination of the government's chief witness (J.A. 144-145), is characterized by petitioners (Pet. 14) as a personal attack on counsel. Petitioners also consider as an insult to the defense the remarks of the judge to the jury (J.A. 142):

> I might admonish the jurors not to go to sleep during the argument, because I don't see how you can possibly do your duty as jurors and keep your eyes shut. Keep your eyes open and your ears open too or you are not doing your proper function as a juror.

This remark was made after the prosecutor's argument and before that on behalf of petitioners (see Pet. 14). The reasonable interpretation is that the judge had observed some of the jurors closing their eyes and admonished them before the defense began its argument.

In his instructions, the judge charged the jury not to interpret his actions as an expression of opinion (J.A. 148).

c. Although they do not raise as a separate question the correctness of the court's rulings on various matters, petitioners argue that the fact that the judge ruled against them showed bias. This conclusion is unwarranted. Many of the cited rulings were correct, but, even if they were not, mere error does not establish prejudice.

For example, petitioners complain that the judge did

not instruct that the government witnesses were accomplices (J.A. 140-142; *cf.* Pet. 13). The judge did instruct that "no matter how small the degree may be, the person who aids another in the commission of a crime is an accomplice" (J.A. 153). This was clearly adequate.

Petitioners argue that prejudice was shown by the fact that the court allowed a defense witness to be cross-examined as to arrests for running a disorderly house and for sodomy.[4] The defense had called the witness for the purpose of "attacking the character" (J.A. 102) of Mary Sharp, the government's chief witness, who had already admitted to being an avowed prostitute (J.A. 103). The defense witness testified on direct that she had engaged in prostitution on dates made for her by Mary Sharp during 1954-1955 which was prior to the times charged in the indictment (J.A. 101-103, 113). On cross-examination the witness testified that she had abandoned prostitution after 1959 and it was in response to this testimony that the court permitted the prosecutor to ask the questions concerning her arrest on several occasions in 1960 on charges which indicated the falsity of her statement. The court stated that it considered the cross-examination proper (J.A. 106). While the correctness of the ruling may be open to dispute (but see *Beach* v. *United States*, 149 F. 2d 837, 839 (C.A. D.C.), certiorari denied, 326 U.S. 745), it was clearly not prejudicial considering

[4] Contrary to the implication in the petition (Pet. 12), the court did not impede defense counsel's attempt to impeach one of the government witnesses with questions concerning his prior record of criminal convictions (J.A. 132).

the tangential purpose for which the witness was called and in no sense indicates that the court was biased against petitioners.

There are other rulings by the judge about which some question could be raised, such as the prohibition against counsel's use of the transcript during oral argument (J.A. 142-143). However, petitioners do not claim that this was reversible error and it could not be such since counsel could summarize the facts from the transcript.

In sum, the fact that petitioners' arguments were frequently rejected does not necessarily evince hostility. The record as a whole shows that, as the court of appeals held, "the conduct of the trial fell within permissible limits" (Pet. 18).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1962.

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